

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE EASTERN DISTRICT OF VIRGINIA  
3                   RICHMOND DIVISION

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6       ePLUS, INC., : Civil Action No.  
7       vs.           : 3:09CV620  
8       LAWSON SOFTWARE, INC. :  
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12                   COMPLETE TRANSCRIPT OF THE CONFERENCE CALL

13                   BEFORE THE HONORABLE ROBERT E. PAYNE

14                   UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

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3 THE COURT: Hello.

4 MR. MERRITT: Good morning, Judge. This is Craig  
5 Merritt, and we've got the counsel for your ePlus conference  
6 call.

7 THE COURT: All right. Now, what I told Mr. Merritt,  
8 I believe the last time we were together -- let's see. Let's  
9 get everybody on the record here, and speak when you give your  
10 name. Mr. Merritt is for the plaintiff. Who else?

11 MR. ROBERTSON: Scott Robertson, Your Honor. I'm on  
12 the line for ePlus.

13 MR. CARR: This is Dabney Carr for Lawson Software.

14 MR. McDONALD: Good morning, Your Honor. Also for  
15 Lawson, this is Dan McDonald and Josh Graham from Merchant &  
16 Gould.

17 THE COURT: All right. I mentioned that we'd like to  
18 try to talk about trial dates. You had originally had a date  
19 of the 14th through the 18th and the 21st through the 24th of  
20 June which I told you the last time we were together we  
21 couldn't make, and so now I'm looking at September, and any  
22 week in September is fine.

23 MR. ROBERTSON: Judge, this is Scott Robertson for  
24 ePlus. Obviously we'd like the first opportunity we can to be  
25 before you, so September works for us. Might I suggest, if

1 it's available, September 13th given I think Labor Day falls  
2 late in the year.

3 THE COURT: It's the 6th this year.

4 MR. ROBERTSON: Yeah, that's right. I think we'll  
5 probably all be working through that weekend, but I just think  
6 it'd be difficult to start a trial right after that, that  
7 Monday. But if it's available and Your Honor wants to do that,  
8 then we're agreeable.

9 MR. McDONALD: Your Honor, this is Dan McDonald.  
10 September 13th, to begin that day would work really well for  
11 us. The month of September was good. I just had the request  
12 to have it happen after Labor Day just because the witness  
13 availability will be a lot easier after that date, so the 13th  
14 would be perfect.

15 THE COURT: All right. Do either of the companies  
16 have employees in the area from which we draw our jury?

17 MR. ROBERTSON: Sorry, Your Honor, you broke up.

18 THE COURT: Do either of the parties, the company  
19 parties have employees in the Richmond Division, the area from  
20 which we draw our jury?

21 MR. ROBERTSON: I'll check on that, Your Honor. My  
22 client's based in Herndon, Virginia. I think it's probably  
23 unlikely, but they are in the division.

24 THE COURT: Yes.

25 MR. ROBERTSON: But they're not in the Richmond

1 Division.

2 THE COURT: They are in the district, but they're not  
3 in the Richmond Division.

4 MR. ROBERTSON: I think that's -- I can probably say  
5 that with a 95 percent confidence level, but I can confirm that  
6 by this afternoon.

7 THE COURT: All right, that's Lawson; right?

8 MR. ROBERTSON: That's ePlus.

9 THE COURT: What about Lawson? Where is it  
10 headquartered?

11 MR. McDONALD: Lawson is headquartered in St. Paul,  
12 Minnesota, Your Honor. They've got some small offices, I  
13 believe, on the East Coast. I don't think they've got anything  
14 close to Richmond, but I can also confirm that by this  
15 afternoon.

16 THE COURT: You can just let me know if that's the  
17 case. I'll assume they do not have any offices in the Richmond  
18 Division unless you tell me otherwise by tomorrow, and that  
19 just has to do with alerting the jury clerk to how many people  
20 we need to have in here.

21 I'm inclined to -- let's see. I don't think it will  
22 take too long to pick the jury, so we'll just start on the  
23 morning of the 13th at 9:30. Now, do you still think it's  
24 going to take two weeks?

25 MR. McDONALD: We do, Your Honor, for Lawson.

1                   MR. ROBERTSON: For ePlus, I think it's always  
2 maintained eight days, but we can see how it sorts out. I  
3 think you had it scheduled for nine days.

4                   THE COURT: I think that's right. Well, I mean,  
5 we'll get -- I'm reserving that two-week period there for you  
6 all. Now, final pretrial conference, how about the -- let me  
7 ask you this: How many depositions are being taken in the case  
8 that are going to have to require, or you're going to try to  
9 offer in evidence? Any?

10                  MR. ROBERTSON: Yes, Your Honor.

11                  THE COURT: Who is this?

12                  MR. ROBERTSON: I'm sorry, Scott Robertson. There  
13 will be some witnesses who are unavailable that were Lawson  
14 witnesses, I think, that we would like to offer some video  
15 depositions.

16                  THE COURT: Whose witnesses?

17                  MR. ROBERTSON: The defendant's not located within  
18 this jurisdiction, and then there are -- I think the defendants  
19 identified some third parties that it may be calling, and we'd  
20 like to get a notion on who that is, whether they are live or  
21 they will be presented by depositions, so I appreciate Your  
22 Honor's inquiry.

23                  THE COURT: Haven't you all exchanged disclosures in  
24 this case? You surely know who the people are who have  
25 knowledge of the facts in the matter.

1                   MR. ROBERTSON: We have exchanged disclosures, Your  
2 Honor, but we have a limited number of depositions, so we can't  
3 take depositions of all the people who have been identified as  
4 having knowledge, so we'd like to have -- I think the parties  
5 can sit down and discuss and have an agreement. We can have a  
6 more focused discussion on who we're going to actually present  
7 as witnesses.

8                   I think both sides have interrogatories out there,  
9 but I think the positions have been so far that they are  
10 premature. I think as we're moving along now, it's probably  
11 appropriate to sit down and have a discussion as to who we  
12 actually think we're going to be calling as witnesses so we can  
13 make sure those depositions are covered.

14                  THE COURT: Well, Mr. McDonald, what's the deal on  
15 your own witnesses from your company not coming here in person?

16                  MR. McDONALD: I'm actually contemplating and  
17 expecting, Your Honor, that the majority of our people, even  
18 though they aren't located in the jurisdiction, we'll make  
19 available live for testimony. There are a couple of folks that  
20 are over in Europe that were deposed, and I'm not sure they are  
21 relevant to the case anyway, but those I would say maybe not,  
22 they would not be live, but I think the folks that are based in  
23 the U.S., we're going to make them available live.

24                  THE COURT: All right. That takes care of that  
25 situation. Now, what about the people that you deposed in

1 Europe, Mr. Robertson? Do you want them as witnesses live?

2 MR. ROBERTSON: I think they have some relevant  
3 testimony, Your Honor, but I'm not going to have hours of  
4 deposition. I'm going to have a lot of the admissions to be  
5 very focused and presentable. Obviously, I don't want to put a  
6 lot of jurors to sleep by playing videotaped talking heads.

7 THE COURT: Mr. McDonald, if he pays their airfare  
8 and expenses to come to trial, do you have any objection to  
9 bringing them over here so the jury can see them live?

10 MR. McDONALD: I personally don't have any problem  
11 with that at all, Your Honor. It's just a matter of me talking  
12 to the client about that and making sure they're comfortable  
13 with that.

14 THE COURT: Sure, and you tell them that if they want  
15 to win, that's the way to do it, is to get your people in front  
16 of the jury. Jurors don't like these videotaped things.

17 MR. McDONALD: I will tell them that. Thank you,  
18 Your Honor. I need all the help I can get.

19 THE COURT: Mr. Robertson, are you willing to pay  
20 their way and put them up for the period they're here?

21 MR. ROBERTSON: Your Honor, again, that's something I  
22 would have to discuss with my client.

23 THE COURT: Yes, and how many millions of dollars do  
24 you say are at stake in this case?

25 MR. ROBERTSON: I think the damages are north of 30-

1 to \$40 million now, Your Honor.

2 THE COURT: And do you think that your client,  
3 knowing that it is rolling the dice on 30- to \$40 million,  
4 can't afford an airplane ticket and a hotel? The hotels here  
5 aren't expensive.

6 MR. ROBERTSON: I've spent a number of weeks down  
7 there in Richmond, Your Honor, to know that the expense is not  
8 insubstantial.

9 THE COURT: That is a brassy statement for somebody  
10 from Washington to make.

11 MR. ROBERTSON: I didn't intend it to be, Your Honor,  
12 but that would help focus the mind on who is really necessary  
13 for the trial.

14 THE COURT: I found in the past that in these patent  
15 cases, the less you have to rely on videotaped testimony or  
16 deposition testimony, the better chance the jury has of  
17 understanding what's going on, and it's worth it to both sides  
18 to work out ways to make that happen. So we'll count on you  
19 all to try to do that. You tell your client that when you're  
20 rolling for big sums, you usually put some ante on the table,  
21 and that will help them understand the need to get some people  
22 here and stimulate the Richmond hotel industry in which I have  
23 no stock or other interest.

24 All right. That won't -- if we do that, we won't  
25 have but so much difficulty at the pretrial conference. What

1       is the volume of documents in this case? Plaintiff, what do  
2       you see the volume of documents being?

3                    MR. ROBERTSON: Just based on my experience with the  
4       Ariva and the SAP case, I just tell you the approach that Judge  
5       Spencer took was he admitted virtually all of the plaintiff's  
6       and the defendant's exhibits into evidence and really only  
7       excluded about a handful. I would say at that time the  
8       plaintiff had about 1,500 exhibits, and he excluded perhaps  
9       ten. I think the defendant had a little more than that. That  
10      was just the approach Judge Spencer took.

11                  There are a number of manuals. There's going to be a  
12      number of video demonstrations. If I had to guess right now,  
13      Your Honor, I think the exhibits would be in the nature of 5-  
14      to 700, but, you know, I'm just guessing that based on what  
15      we've looked at in trying to whittle down the exhibits for  
16      depositions.

17                  I mean, the defendant has produced more than  
18      2.8 million pages of documents. I'm not faulting them for  
19      that. We're still making our way through that review right  
20      now, Your Honor, but we have what I would suggest is a focused  
21      set of key documents, and that's my best guesstimate as I stand  
22      here in March some six months before the trial.

23                  THE COURT: Well, I understand. How about you, Mr.  
24      McDonald?

25                  MR. McDONALD: I don't know that I disagree with what

1       Mr. Robertson said, Your Honor. I certainly am one who  
2       believes less is more, but given the complexities here, I think  
3       at least in terms of the admitted documents, there are going to  
4       be at least several hundred. I think when we have people up on  
5       the witness stand, we're obviously hoping to use a small  
6       fraction of that.

7                     THE COURT: Judge Merhige had an approach that even  
8       if a document was admitted, if you didn't use it in trial, it  
9       was excluded, and I think I'm going to adopt that, and I can  
10      tell you that I don't anticipate admitting 500 to 700 documents  
11      for a jury to consider.

12                  You all have to figure the ones you're really going  
13      to use, and the pretrial conference will be used to exclude  
14      exhibits that don't belong in and to admit those that do, and  
15      so you're going to have to be prepared, exhibit by exhibit, to  
16      deal with these things.

17                  They won't come in wholesale, and I don't -- I'm not  
18      looking to see a lot of paper that this jury has to look at.  
19      Most of the time it's not necessary. I do understand that in  
20      some instances in patent cases it may be, but my experience has  
21      been that you probably use maybe 50 documents and that's about  
22      the end of what you actually use. Sometimes it's less than  
23      that.

24                  So we'll see, but I'm trying to figure out when to  
25      have the pretrial conference, because I want to get that done

1       in time for you all to get ready, get the paper ready for the  
2       trial. All right, let's have the final pretrial conference on  
3       Monday, August 16th at 9:30.

4                   MR. CARR: Judge, could you repeat that.

5                   THE COURT: Monday, August 16th, at 9:30. Can you  
6       all do that?

7                   MR. MERRITT: Yes, sir.

8                   MR. McDONALD: Lawson can, Your Honor, thank you.

9                   UNIDENTIFIED SPEAKER: I didn't mean to speak for  
10      you. Are you available?

11                  UNIDENTIFIED SPEAKER: Yes, I am.

12                  THE COURT: If necessary, I'll go into the next day,  
13       but I think if you all work hard, you'll be combat ready to get  
14       things done. Now, with those dates set, let's go look at the  
15       schedule you all put together. The last one I have from you  
16       all is on the 18th of November that I believe Mr. Willett  
17       confirmed that that -- I'm sorry, I turned my back to you all.  
18       The last one I have is November 18th. Is that correct, the  
19       last one you tendered in here?

20                  MR. ROBERTSON: Scott Robertson, Your Honor. I think  
21       that's right.

22                  THE COURT: I just want to look at a couple of  
23       things. All right, you're going to have to adjust everything  
24       based on what's in paragraph I of pretrial schedule A and the  
25       trial date. You'll have to back it up.

1                   MR. ROBERTSON: Judge, if it might help, we've got a  
2 draft of that. We were assuming sort of a mid September trial  
3 date, and I can plug in the pretrial date now, and I can send  
4 it to Mr. Merritt, he can forward it to Mr. Carr and to  
5 Lawson's counsel and see if those dates work, and if we can  
6 come to agreement, we can just submit something. I think it's  
7 just a matter of the dates.

8                   I think on the substantive issues, we've all come to  
9 agreement, and the Court signed off on that previously, so it's  
10 just a matter of plugging in the dates off the pretrial.

11                  THE COURT: Yeah, I think that's right.

12                  MR. CARR: Your Honor, this is Dabney Carr. As I  
13 recall, the only other dates that you had dictated to us that  
14 you had wanted had to do with when we would -- last day to file  
15 summary judgment and when the last day to schedule the hearing  
16 was.

17                  THE COURT: Yes. We want those summary judgment  
18 motions filed -- you all have done some discovery, so when are  
19 you going to cut off discovery? When do you want to cut off  
20 discovery?

21                  MR. ROBERTSON: Discovery cutoff presently, Your  
22 Honor -- this is Scott Robertson again -- was March 29th. I  
23 think at least that would move out based on the trial  
24 date another seven days or so.

25                  THE COURT: I know, but there's no sense in -- you

1 all were working against that date and have been except when I  
2 told you we were going to have to move it, so you've got most  
3 of your depositions done, do you?

4 MR. ROBERTSON: I think we have a fair amount to go,  
5 Your Honor, including third-party depositions which I think are  
6 just, you know, getting underway. So obviously we'd like to  
7 have a little bit of breathing room in there built into the  
8 schedule. I think I can sit down with Lawson's counsel, and we  
9 can work out something that would be mutually agreeable.

10 THE COURT: Do you want to extend it 30 days?

11 MR. ROBERTSON: I'd like to extend it 60 days, Your  
12 Honor.

13 THE COURT: What is that, May?

14 MR. ROBERTSON: Yes, sir.

15 MR. McDONALD: I would think we can get it done by  
16 perhaps mid May, but maybe it does make sense for Mr. Robertson  
17 and I to talk this through.

18 THE COURT: I'm looking at mid May, I think, is as  
19 late as I want it, and then summary judgment motions by the end  
20 of May.

21 MR. McDONALD: All right, that's fine with Lawson.

22 THE COURT: That would be the 31st of May.

23 MR. CARR: Your Honor, the 31st is Memorial Day.

24 THE COURT: You know what? In the computer world, it  
25 doesn't make any difference.

1                   MR. McDONALD: Dabney, we'll just work on getting it  
2 done by Friday so you can have the weekend off. How's that?

3                   THE COURT: May the 29th, summary judgment.

4                   MR. CARR: I believe that's a Saturday, Your Honor.

5                   THE COURT: It is? 28th? What happened to the world  
6 in which all these lawyers worked 24 hours a day, because I've  
7 had it reported to me from on high that there are an awful lot  
8 of lawyers whose billing records indicate they work all the  
9 time. All right, 28th, and then the response?

10                  MR. ROBERTSON: That forces the plaintiff to work  
11 over Memorial Day weekend, 24 hours a day, because the clock is  
12 ticking on us, so we'd hope we can get maybe a little bit of  
13 leeway in there to respond to the summary judgment motions. I  
14 think -- could anticipate it might involve expert declarations  
15 as well.

16                  THE COURT: What do you want, the 15th of June? The  
17 18th?

18                  MR. ROBERTSON: That would be fine, Your Honor.

19                  THE COURT: You want the 15th, all right. Motion for  
20 summary judgment response, June 18th. I mean 15th. And then  
21 your response the 21st. I mean the reply.

22                  MR. McDONALD: All right.

23                  THE COURT: All motions *in limine* should be filed by  
24 June 18th.

25                  MR. ROBERTSON: Sorry, Your Honor, Scott Robertson.

1       June 18th, you said?

2                   THE COURT: June 18th. All responses to the motions  
3       *in limine* July 2. All replies to the motion *in limine*  
4       July 12th. Anything else?

5                   MR. McDONALD: Your Honor, this is Dan McDonald for  
6       Lawson. I'm just wondering, given that we've only got about  
7       six days for that reply on the summary judgment, I'm looking at  
8       ten days on the reply *in limine*, and I'm going  
9       to respectfully request for at least a couple more days on that  
10      reply on the summary judgment to maybe June 23rd or 24th.

11                  THE COURT: The 24th is fine.

12                  MR. McDONALD: Thank you.

13                  MR. ROBERTSON: Judge, this is Scott Robertson for  
14       plaintiff. You had mentioned discovery cutoff of mid May. I  
15       didn't know if I got an exact date. Given that Lawson just  
16       asked your indulgence for a little more time on that, could I  
17       ask your indulgence for a specific date of May 21st as the  
18       discovery cutoff?

19                  THE COURT: When are the summary judgments due?

20                  MR. ROBERTSON: May 31.

21                  UNIDENTIFIED SPEAKER: May 28.

22                  THE COURT: That's only seven days before the summary  
23       judgment cutoff. What is your view on that, Mr. McDonald? The  
24       plaintiff is probably not going to be filing any summary  
25       judgment motions, are you, Mr. Robertson?

1                   MR. ROBERTSON: I don't think so at this time, Your  
2 Honor.

3                   MR. McDONALD: I think we can get that by May 14th,  
4 Your Honor.

5                   MR. ROBERTSON: Let me make a caveat, Your Honor. I  
6 apologize. There may be a summary judgment that certain  
7 defenses are not legally sound, but I'm not going to be moving  
8 for summary judgment of infringement. It's not because I don't  
9 have confidence in the case, Your Honor. I just think, based  
10 on my experience with Ariva and SAP, the Court wants to hear  
11 the evidence, and I think that's appropriate.

12                  THE COURT: Well, why don't you cut it off on  
13 May 18th?

14                  MR. ROBERTSON: That's fine, Your Honor.

15                  MR. McDONALD: No objection for Lawson, Your Honor.

16                  THE COURT: All right. Now, let's see, is there  
17 anything else you all need to take up?

18                  MR. ROBERTSON: Not for the plaintiff, Your Honor.

19                  MR. McDONALD: Not for Lawson, Your Honor.

20                  THE COURT: All right, now, what are you going to do  
21 about these experts? You all, ePlus filed an expert  
22 declaration, and it was objected to, and I struck it and  
23 required you -- struck your brief and required you to file a  
24 brief without that. I haven't looked at the brief that was  
25 filed with it, but I did say at the conclusion of the hearing

1       that you all should let me know if you felt like we needed to  
2       have expert evidence as part of the Markman, but I feel like if  
3       that's the case, then I need the input of both sides before  
4       accepting any evidence or allowing any evidence. What's the  
5       position of the plaintiff? Do you still want expert evidence,  
6       Mr. Robertson?

7                   MR. ROBERTSON: Your Honor, our position is that we  
8       think it's not necessary under the law, but we thought it would  
9       be helpful, and after, you know, colloquy with the Court over  
10      the course of several hours over two days, sorry if there was  
11      some misunderstanding, but I came away with the clear  
12      impression that the Court was seeking some guidance with  
13      respect --

14                  THE COURT: Mr. Robertson, I'm not faulting you about  
15      your decision. All I'm saying is that if it's to be done, then  
16      both sides needed to have input into it is what I contemplated,  
17      and I perhaps didn't say it right, and just so that everybody  
18      can be heard about how, if at all, we're going to do it, so  
19      that's what I'm doing now. Do you still want expert evidence  
20      offered?

21                  MR. ROBERTSON: Your Honor, as a matter of law, I  
22      don't think it's necessary. If the Court thinks it would be  
23      helpful, I'm happy to do whatever the Court directs us to do.  
24      As a matter of law, I don't think it is necessary. I'm happy  
25      to comply with the Court's order, revise our brief about the

1 expert testimony. The arguments are going to change in  
2 substance, but I will comply with the Court's order.

3 THE COURT: Well, I understand that. What I'm trying  
4 do is put us back to -- what I had in mind was if people wanted  
5 expert evidence or thought it was a good idea to have, then  
6 we'd all sit down and talk about it and figure out how to put  
7 it in; would it be in by affidavit, would there be depositions  
8 first, what?

9 Usually, it's affidavit evidence, and then if the  
10 other side wanted it, they could have it. So your answer is  
11 you don't want it; is that right, Mr. Robertson?

12 MR. ROBERTSON: I guess my concern, Your Honor, is  
13 it's going to add a level of cost and delay that I think may  
14 not fit into the schedule right now. I mean, I've heard what  
15 the Court was suggesting at the hearing. I thought the  
16 defendants heard it as well. I was, quite frankly, expecting  
17 them to have an expert declaration, but I understand now where  
18 we are now on that situation.

19 I think I'd like to move forward and get things  
20 resolved on this unless the Court tells me that it would be of  
21 great assistance to the Court in resolving this issue about the  
22 algorithms, and I heard the Court loud and clear about the  
23 frustrations it's having with federal circuits' perhaps lack of  
24 guidance in that area.

25 THE COURT: So in any event, all I -- if you were to

1 submit it, I don't see there's any expense. You just would  
2 submit the same affidavit and the same brief, and we'd be doing  
3 it with agreement if we did it. Now, Mr. McDonald, what's your  
4 position on it?

5 MR. McDONALD: My position, Your Honor, is it  
6 continues to be unnecessary and actually creates a high risk  
7 area. I've seen too many federal circuit decisions where if  
8 there's undue -- or Court of Appeals opinion, undue reliance on  
9 experts, that's a reversible error, and it seems to me like if  
10 we keep this focus on the intrinsic record, we've got a lot  
11 better chance of this thing not coming back.

12 So I'm against it. I wouldn't use one in the  
13 affirmative. I had grave concerns, as we indicated in our  
14 motion to strike, about what the ePlus expert said. The only  
15 thing I would want is some sort of rebuttal if we're going to  
16 do it at all.

17 I think what I hear Mr. Robertson saying, though, is  
18 that, you know, we don't need to bother with that at this  
19 point, and I don't want to make my client pay for the money of  
20 having to prepare an expert to rebut the ePlus expert at this  
21 point. I see no value in it at all.

22 MR. ROBERTSON: Your Honor, if I could just direct  
23 the Court to the leading case on it. Maybe the Court would  
24 like to go take a look at that, and I can send it to you today  
25 if you'd like or however you'd like, but the case is *Intel*

1      *Corporation v. VIA Technologies.* It's 319 F.3d 1357 at 1367,  
2      federal circuit 2003, and it's cited for the proposition that  
3      knowledge of a person of ordinary skill in the art can be used  
4      by the Court to make clear how to implement a disclosed  
5      algorithm in a computer implemented case.

6           So, obviously, it can be used. It's not disfavored.  
7      If it assists the Court, it assists the Court. The only issue  
8      I would have is going to be a rebuttal declaration. My expert,  
9      Dr. Weaver, is taking the same positions for five years and  
10     under oath and in affidavits.

11           Obviously, Lawson's expert will have to be endorsing  
12     and embracing arguments that were made without his input.  
13     That's fine, but I would like the opportunity to respond to it.  
14     After that, I don't think we would need any further hearing,  
15     argument, or that kind of thing. The Court would do it on the  
16     papers, but it's certainly permissible -- I've already gone  
17     ahead and done it. If there wants to be a rebuttal expert  
18     declaration, I'd just like to be able to react to it. That's  
19     all.

20           THE COURT: All right. Well, here's what I think. I  
21     think it would be helpful to have it on the topic of the  
22     algorithm which is the basic -- as far as -- the only thing I  
23     really read was sort of the opening paragraphs of this guy's  
24     affidavit.

25           Insofar as I'm concerned, you wouldn't change

1 anything. You'd file just exactly what you filed before; is  
2 that right, Mr. Robertson?

3 MR. ROBERTSON: That's correct, Your Honor.

4 THE COURT: Then I'm going to vacate the order I  
5 entered striking it, allow -- because I think it will be  
6 helpful, on the basis of the *Intel* case, to allow the filing of  
7 that affidavit and keep the brief the same as it was. How long  
8 do you want to file a response if you file one substantively?

9 MR. McDONALD: Your Honor, my issue is my expert is  
10 out of the country until March 15th, so I need a little time to  
11 be able to talk to him after he gets back.

12 THE COURT: Frankly, I can't imagine he's going to  
13 disagree with a whole lot of it. Mr. Robertson picked somebody  
14 who's been doing this for five years, so he's got to be right,  
15 don't you think?

16 MR. McDONALD: Well, we're going to have a little  
17 different perspective.

18 THE COURT: I expect there'll be a difference. Why  
19 don't you file it by March 22nd?

20 MR. McDONALD: That sounds good, thank you.

21 THE COURT: Then you file any reply that you have by  
22 March the 29th, Mr. Robertson, and that will be it.

23 MR. ROBERTSON: Thank you, Your Honor.

24 THE COURT: And I think that takes care of it. All  
25 right.

1                   MR. ROBERTSON: Your Honor, I just had one little  
2 footnote to bring up with you that you had raised at the last  
3 hearing about the ability of the district court to vacate a  
4 prior order.

5                   You may recall that you mentioned Judge Scalia's  
6 Supreme Court opinion. I just wanted to refer you. I went and  
7 looked it up. It's *U.S. Bancorp Mortgage Company v. Bonner*  
8 *Mall Partnership*.

9                   THE COURT: Right.

10                  MR. ROBERTSON: 513 U.S. 18, 1994 decision. I just  
11 wanted -- it's actually quoted in the case that we had cited to  
12 Judge Spencer about vacating his claim construction. For the  
13 record, I'd like to give you that cite. It's *Dana v. E.S.*  
14 *Originals*, 342 F.3d 1320. It's a September 2003 Federal  
15 Circuit decision, and the decision actually speaks to the fact  
16 that appellate courts cannot vacate a district court order, but  
17 district courts are free, pursuant to Rule 54(b) and Rule  
18 60(d), at any time prior to final judgment to vacate their  
19 orders, which is exactly what we urged Judge Spencer to do,  
20 citing both *Bancorp* and the *Dana* case, and Rule 60(b), which is  
21 exactly what he did, and even Judge Scalia, in his *Bancorp*  
22 decision, indicates that district courts, unlike appellate  
23 courts or even the Supreme Court, have full authority to do  
24 that.

25                  So I just -- you piqued my interest, and I just

1 wanted to bring that to your attention.

2 THE COURT: Just for your future edification, go read  
3 Judge Moon's recent opinion in Spencer against -- I think it's  
4 an insurance company. I can't remember. It's out of the  
5 Western District of Virginia, and let's see. You might read --  
6 I'm trying to remember the opinion I authored on it because I  
7 think Justice Scalia's opinion speaks more broadly about the  
8 real purposes of -- I recognize that *Bancorp* dealt with the  
9 position of a Circuit Court vacating, but the bottom line of  
10 *Bancorp* is that once decisions are entered, they belong to the  
11 public, and, yes, you can, under appropriate rules, vacate  
12 them, but you have to make the showing required under an  
13 appropriate rule.

14 And I think it's almost impossible to make that  
15 showing, but it's quite difficult, and it most often comes up  
16 when people want to settle cases, and they want to eliminate  
17 what the district court has done, and I have universally taken  
18 the case that settlement doesn't -- taken the view that  
19 settlement doesn't qualify as a reason under Rule 59 or 60 for  
20 vacating a judgment on any topic, whatever it may be.

21 I'm certainly aware -- in fact, if I remember  
22 correctly, there have been some recent amendments to the  
23 Federal Rules that allow, under certain circumstances, vacating  
24 of judgments to deal with part of the situation created by  
25 *Bancorp*, but that doesn't have anything to do with us here now,

1 does it?

2 MR. ROBERTSON: No, sir. I just was following up --

3 THE COURT: Well, I'm pleased to get educated any  
4 time, so the more I learn, the more I know I don't know, so I'm  
5 happy to have it. Thank you.

6 Is there anything else we need to go through? All  
7 right, you'll do a revised order then, Mr. Robertson, Mr.  
8 McDonald, and get it down here, and we'll enter it; right?

9 MR. McDONALD: Yes, Your Honor, thank you.

10 THE COURT: Thank you all a lot. Bye.

11

12 (End of proceeding.)

13

14

15 I certify that the foregoing is a correct transcript  
16 from the record of proceedings in the above-entitled matter.

17

18

19

/s/

20

P. E. Peterson, RPR

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Date

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